IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-158

ALLAN J. BESBRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HARRY M. WEISS
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ATTORNEY FOR PETITIONER

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered May 4, 1978, rehearing denied, June 7, 1978.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at ____F.2d____(No. 77-2677, 9th Cir. May 4, 1978) and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), all issues herein raised having been heretofore raised in the court below.

QUESTIONS PRESENTED

1. Whether the United States District Court Judge erred in refusing to individually examine prospective jurors as to their attitudes about the crime petitioner was charged with in light of massive pre-trial publicity about the crime in the District.

2. Whether the United States District Court Judge erred in denying petitioner's motion to sever based upon Kotteokas v. United States, 328 U.S. 750, 66 S.Ct 1239, 90 L. Ed 1557 (1946).

   a) Whether the District Court Judge should have instructed the jury as to the issue of single or multiple conspiracy sua sponte.

b) Whether the Court of Appeals for the Ninth Circuit erroneously assigned a question of law to the provence of the jury as an issue of fact.

STATEMENT

This petition arises out of the affirmation of the Judgment of Conviction of petitioner of violating 18 U.S.C.§§ 1341 and 2 (mail fraud and aiding and abetting) in fifteen counts and of violating 18 U.S.C. §§ 2314 and 2 (interstate transportation of property obtained by fraud and aiding and abetting[1/]) in two counts. (Cl. Tr. p. 519).

Petitioner was employed by Western Land Sales Company ("WLS") as corporate secretary and as an employee for only eight months from November, 1971 through June 26, 1972. Petitioner was an attorney admitted to proactice in California in 1971 and in Arizona on April 22, 1972. (Rptr. Tr. pp. 1836-1839)

1. The Judgment erroneously defined §2314 as "Securities Fraud" (Cl. Tr. p. 519)

After graduating from the University of Southern California Law Center in 1970, petitioner worked for the California State Department of Justice, Criminal Division for approximately one year. He then moved to Phoenix, Arizona. In Phoenix, he worked for several months as a law clerk for a local attorney, and then worked for a title company for several months. Prior to his working for WLS, petitioner did not know and had never heard of Jacob Hood (the sole shareholder and President of WLS) or of WLS itself. (Rptr. Tr. pp. 1840-1845)

Petitioner's duties with WLS had nothing to do with the sale of real estate or of real estate receivables, nor did he have any job responsibilities involving financial management of the company. (Rptr. Tr. pp. 1847-1857)

Beginning in 1967 and continuing after petitioner left WLS, Mr. Hood engaged in various illegal activities involving

multiple lot sales and the creation of fraudulent contracts on the sale of real estate owned by WLS.

The nefarious practices engaged in by WLS came under the general rubric of "land fraud", a disease which seemingly saturated the Arizona climate and press during that period.

Petitioner professed his ignorance of the fraudulent activities of WLS and even the President of the company stated that he never told petitioner of the fraudulent activities of the company. (Rptr. Tr. pp. 1531, 1592)

The atmosphere of publicity about land fraud.

The atmosphere which prevailed in Arizona for a year or two preceding petitioner's trial is difficult to describe and equally difficult to believe. Suffice it to say that the term "land fraud" and Arizona became synonymous. The local press, including the Arizona Republic, Arizona's

largest newspaper, fed upon prosecutions and revelations concerning fraudulent or questionable land development companies, and, in turn, the widespread and pervasive publicity fanned the Arizona prosecutive agencies, state and federal, into action and perhaps over-reaction.

If, by the time of petitioner's trial, the frenzied atmosphere created by the continual and repeated headlining of "crooked" land development companies did not produce a situation resembling Salem in 1692, or more recently, McCarthyism in 1952, it certainly was not far from it. Even a casual perusal of the front page stories in the Arizona Republic for the six months preceding petitioner's trial reveals an atmosphere having all the earmarks of a classic and fullblown witchhunt. (Cl. Tr. pp. 165-171, 195-272)

In the six months preceding petitioner's trial, there were articles virtually

every other day on the subject of "land fraud" and "land swindles". Revelation followed revelation. Sensational headline followed sensational headline. Land development companies became notorious by virtue of the continual and relentless media treatment. The names of these companies may not be familiar to this Court, but the names of Cochise College Park, Great Southwest Land and Cattle Company, New Life Trust Company and, because of the indictment and attendant publicity, WLS, are seared into the minds of the literate populous of Arizona as infamous and patently fraudulent. Perhaps they should be, but that is beside the point at issue here.

But the avalanche of publicity regarding the evils of Arizona-style land fraud was hardly limited to fraud. Defunct land development companies and those associated with or employed by such companies

were inextricably tied into and held responsible in the press for practically every other evil, sin and wrong afflicting Arizona. Among the other evils were official corruption, bribery, extortion, organized crime, and, yes, murder.

In sum, the Arizona Republic and other Arizona news media inundated the Arizona public with massive doses of adverse publicity concerning individuals associated with defunct land development companies. Such a continual barage of adverse publicity could have no affect other than to create among the literate veniremen in Arizona a strong and abiding prejudice (a predisposition towards guilt) against individuals employed by land development companies who stood accused of fraud. It was doubtlessly a "hang-the-bastards" atmosphere, and the subconscious conditioning leading to that hanging climate was continuously reinforced before

and during petitioner's trial. To further exacerbate matters, petitioner was an attorney, and the adverse impact of prejudicial pretrial publicity was compounded when overlayed with the prejudices which, rightly or wrongly, since Watergate have stained all members of the bar.

It was in this atmosphere that petitioner went to trial.

Prior to trial, petitioner moved for transfer of his case from the District of Arizona. (Cl. Tr. pp. 164-171) At a hearing of the motion on March 8, 1977, the District Court Judge perfunctorily denied that motion. (Rptr. Tr. Vol. X, pp. 27-28).

BASIS FOR FEDERAL JURISDICTION

The United States District Court for the District of Arizona had jurisdiction of this case under 18 U.S.C. §3231, it being alleged that the crimes charged were violations of federal statutes.

REASONS FOR GRANTING THE WRIT

1. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE DISTRICT COURT JUDGE ERRED IN REFUSING TO ADEQUATELY, INDIVIDUALLY EXAMINE PROSPECTIVE JURORS AS TO THEIR ATTITUDES ABOUT THE CRIME WITH WHICH PETITIONER WAS CHARGED AND THEREBY DENIED PETITIONER DUE PROCESS OF LAW.

During the period prior to petitioner's trial, commencing with this indictment, there was but one article dealing with, in part, petitioner. That certainly does not, by itself, constitute massive pre-trial publicity. There was, however, virtual daily coverage in the media of inflamatory news items relating to land fraud. The coverage was for such long duration and of such intensity that virtually every literate veniremen in Arizona must necessarily have had some knowledge of land fraud and must equally necessarily formulated some opinion about persons accused of that crime.

During the change of venue motion

hearing, the District Court Judge , recognizing the pretrial publicity about land fraud,indicated that in voir dire, that problem could and would be taken care of. He said:

> "The Motion for Change of Venue - let me simply say about that, I have looked over what you have said. Basically, the defendant Besbris goes on, the publicity in the field of land fraud. I think the only way to determine whether a jury can or cannot try this case free of any prejudice is to find out at the time we select the jury, and I would ask those of you who are going to trial on the 19th to be prepared to submit any proposed voir dire questions, and the Court may or may not ask them." (Rptr. Tr. Vol. X, p. 27)

Unfortunately, such voir dire examination never materialized.

Extensive questions were propounded to the judge in order to uncover any bias or prejudice possibly held by prospective jurors. These questions were not asked by the trial judge.

The Ninth Curcuit Court of Appeals, citing United States v. Giese, No. 74-3407, slip op. p. 518, 532 (9th Cir. Feb. 16, 1978) stated:

> "in cases of less publicity,...these procedures are not required. Several general questions addressed to the entire panel of jurors, followed by individual questions of jurors who respond affirmatively to the initial inquiries, may be sufficient if it becomes clear that few jurors have any knowledge of the case. (emphasis in original)".

In this case, the trial judge asked no questions of prospective jurors concerning what, if anything, they knew about land

fraud in general, although the court did ask whether or not any of the prospective jurors were aware of this case or of any of the parties thereto.

Accordingly, the absence of any questions addressed even to the entire panel, en masse, about their attitudes or experiences or information about land fraud, gave no opportunity to determine if additional voir dire was needed. Never having gotten that far, it was impossible for petitioner to determine who among the prospective jurors could be excused for cause, or who should be peremptorily challenged.

Petitioner contends that this Court ought to set standards for what constitutes adequate voir dire, consistent with due process, in cases where the publicity does not attach to the defendant, per se, but to him by virtue of the crime he is alleged to have committed. The rule as set forth

by the Ninth Curcuit in Giese does not deal with such as case and is therefore inconsistent with fair trial standards as set forth by this Court in Shepard v. Maxwell, 384 U.S. 333 (1966).

This Court has very plainly stated the standards for a fair trial re: voir dire, in Shepard v. Maxwell, id. This Court should review the conduct of the trial judge and the Ninth Circuit Court of Appeals if this rule is not to be contorted into meaninglessness.

2. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE RULE OF KOTTEOKAS V. UNITED STATES REMAINS VALID LAW AND WHETHER IT PRESENTS A QUESTION OF LAW OR OF FACT.

Introduction

Count One of the indictment in this case covered thirteen pages and set forth a scheme to defraud by use of the mails. Count One named sixteen individuals as defendants and, in substance, charges each of them as principals or with having aided and abetted the scheme to defraud. (Cl. Tr. pp. 1-13). It alleged that the scheme begain on or about February 16, 1967, and continued until January, 1974, a period of approximately seven years.

On its face, Count One purported to allege one scheme by the sixteen defendants.

By the conclusion of the Government's case-in-chief, however, it became clear that the Government had in fact proved four separate, distinct schemes.

Moreover, some of the defendants at trial participated in one, some in two, but none in all of the schemes as to which proof was offered.[2/]

Four co-defendants, Stewart, Baumann, Crowell, and McDonald, were tried jointly with petitioner.

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2. The opinion of the Ninth Circuit stated that "Although the defendants entered and left the operation at different times, there was no fatal variance rendering the joint trial improper." p. 10, Opinion. At the close of the Government's case-in-chief, the following discussion between petitioner's counsel and the trial judge took place:

"THE COURT: You mean to say theire is more than one scheme or plan?
MR. BONNER: Absolutely.
THE COURT: I don't agree with you. Go on to another point.
MR. BONNER: Could I just briefly be heard on it?
THE COURT: I know the law and I know the cases. I just don't agree with you. I have heard the whole case. I just don't agree that that is a valid point. I don't see that you have to belabor it.
MR. BONNER: Well, could I --
THE COURT: I have been through it many a time. I don't see that there is more than one plan or scheme here. I think there is a continuing one which people go in and out of but I don't think there is any different kind of a

Based upon the Government's proof the following four discrete schemes emerged:

Scheme One: The veidence showed that McDonald, through his company, McDonald Investment Company, purchased lot purchase contracts at a discount from WLS and then, through salesmen of his company, resold such contracts to investors in the upper midwest. Virtually all of the contracts were sold prior to petitioner's employment at WLS. More importantly, there was no evidence that petitioner participated in any way in the creation of these contracts,

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2. (Continued)
plan or scheme. It is the same one all the way through. Same company, same principle.
MR. BONNER: You certainly had different individuals that conceivably would have been participating, Your Honor.
THE COURT: No. If you have two plans and schemes they are totally separate, they are not related to each other, they have nothing to do with each other. This is a continuing plan and scheme, if it is anything, and people g in and out of it at different times, presumably." (Rptr. Tr. pp. 1783-1785)

their assignment to McDonald or their sale to investors.

Scheme Two: Co-defendant Baumann was also a mortgage broker. The evidence showed that, like McDonald, his company, Bankers Finance and Holding Company, bought lot purchase contracts from WLS which were subsequently sold to investors. All of these sales also occurred long before petitioner became employed by WLS and, again, there was no evidence that petitioner actively participated in the assignment or sale of such contracts. It should be noted that Baumann, of course, had no connection with McDonald.

Scheme Three: As house counsel for WLS, petitioner participated in arranging three loans made by sophisticated investors to WLS. No mortgage broker participated in these loans. Neither Baumann nor McDonald had any involvement with them.

Scheme Four: After the Securities and Exchange Commission precluded McDonald from selling lot purchase contracts, Hood devised a scheme to sell corporate promissory notes, secured by mortgages on specific lots, through McDonald Investment Company. No evidence was introduced to show any connection whatever between that program and petitioner or defendant Baumann. This was the scheme that required cabins to be built on the lots so mortgaged.

Notwithstanding the evidence of wrongful acts in the performance of these schemes - the failure to release lots from trust, the failure to build cabins, the use of forged and fraudulent mortgages and contracts - these fraudulent programs or schemes were clearly separately defined and separately executed by Hood without the participation of more than one co-defendant in any scheme. The common nexus in each case was Hood. The commonality

ends there.

When this Court decided Kotteokas v. United States, 328 U.S. 750 (1946), the rule was clearly announced that variances between indictments and proof, and especially in cases where the common nexus to defendants is one defendant who is the only connection to the co-defendants on trial with him, would not be permitted.

In order not to make a mockery of that rule, this Court should review the Ninth Circuit's judgment in this case to enforce the clear meaning of Kotteokas.

a. SHOULD THE JUDGE HAVE INSTRUCTED THE JURY ON THE ISSUE OF WHETHER THERE WAS A SINGLE OR MULTIPLE SCHEME (CONSPIRACY) SUA SPONTE.

In its opinion, the Ninth Circuit dealt with petitioner's claim of variance by stating "the evidence was sufficient to present the issue whether there was a single or multiple schemes as a question for the jury. United States v. Porter,

441 F.2d 1204, 1213 (8th Cir.), cert. denied, 404 U.S. 911 (1971)" Opinion at p. 10.

It must be noted in this case, however, the question of whether there was one scheme or no scheme, was presented to the jury: that was the verdict question. The issue of whether there was one scheme or multiple schemes, however, was not presented to the jury. The jury received no instructions to guide them in determining whether there was a single or multiple schemes. That question simply was not presented to the jury. Although it is not clear from the Porter opinion, one must presume that such instructions were given to the jury in that case.

The prosecution presented the case as one scheme, the function equivalent of a single conspiracy. The District Judge twice denied motions based upon Kotteakos.

In doing so, he made it abundently clear that he believed that only scheme existed. The trial judge further made it clear that he would not consider an instruction on single or multiple conspiracies, at least tacitly. (Cl. Tr. pp. 2712-2713)

This Court ought to grant this petition for Certiorari to settle the question of whether the problem of variance is one of fact, for the jury, of whether it is one of law, for the trial judge to decide.

Certainly in some cases, the existance of a single or multiple scheme is a question of fact, but in this case it was not. It was twice ruled upon as a question of law by the trial judge. It is therefore error to place that question before the jury without any instructions.

b. DID THE NINTH CIRCUIT ERR IN FOLLOWING THE PORTER CASE WHEN NO INSTRUCTIONS WERE GIVEN TO THE JURY ON THE QUESTION OF

SINGLE OR MULTIPLE SCHEMES TO DEFRAUD.

Allied to the problems discussed in paragraph 2(a) supra, is the question, ab initio as to whether the issue of variance is one for the judge or for the jury.

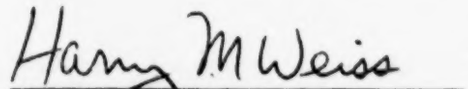
In Kotteokas that question was decided as one for the judge to decide. There is no sound policy or reason in law to assign that issue to the jury. To say that the jury is the ultimate determiner of fact is to beg the question. The trial judge hears all of the evidence during the trial. He need not invade the realm of the jury to decide a question of law. The issue of variance is one of evidence versus pleadings; it does not involve resolving disputed evidence.

Accordingly, this Court ought to grant certiorari to review this question and resolve the dispute between the opinion in this case, the Porter case, and Kotteokas.

CONCLUSION

Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,



Harry M. Weiss
4204 North Brown Avenue
Scottsdale, Arizona
85251

ATTORNEY FOR PETITIONER

Dated: Scottsdale, Arizona
July 3, 1978

AMENDED
CERTIFICATE OF SERVICE

I, the undersigned, being a member of the Supreme Court Bar, certify that I have deposited in the United States Mail, airmail postage prepaid, the original and forty copies of this PETITION FOR CERTIORARI, addressed as follows:

Clerk, United States Supreme Court
1 First Street, N.E.
Washington, D.C.

and that I deposited in the United States Mail, airmail postage prepaid, three copies of this PETITION FOR CERTIORARI, addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

I further certify that this Certificate is made in compliance with Rule 33(3)(b), Rules of the Supreme Court of the United States.

The original Certificate of Service was filed on July 5, 1978. This Amended Certificate is filed on July 26, 1978.

Harry M. Weiss

Harry M. Weiss
4204 North Brown Ave.
Scottsdale, Arizona
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 77-2677
	)	
ALLAN J. BESBRIS,	)	OPINION
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court
for the District of Arizona

Before: WRIGHT and CHOY, Circuit Judges,
and POOLE, District Judge.*

WRIGHT, Circuit Judge:

An Arizona land fruad scheme which operated from 1967 to 1974 resulted in the conviction of these appellants on counts of mail fraud (18 U.S.C. §§ 1341-42), interstate transportation of fraudulently obtained property (18 U.S.C. 2314) and aiding and abetting (18 U.S.C.§ 2). After considering the assignments of error presented by each appellant, we conclude that the convictions should be affirmed as to

all except McDonald. His conviction is reversed.

I

FACTS

Jacob Hood formed Western Land Sales (Western) in 1966 to sell Arizona real estate. It sold subdivision lots on contracts, title remaining in trust until a release price was paid.[1/] In 1969 Western contracted with Bankers Finance and Holding Company (Banker's) to market the contracts held by Wester. Bankers discounted contracts to investors, collected from the buyers of lots, and issued checks for each lot's release from trust. Periodic payments received by Banker's were forwarded to the contract assignee-investors.

Western later signed several subdivision trust agreements requiring payments to be made to the trusts irrespective of lot sales. As a result, its need for

* Of the Northern District of California

ready cash grew. It engaged McDonald Investment Company (MIC) as a second agent for marketing land sale contracts to investors for a commission.

MIC's owner, appellant McDonald, asked for safeguards to insure the soundness of the contracts. Western was to guarantee the contract assignment, [2/] place other contracts in escrow to cover defaults, and arrange for an independent agency to collect contract installments and forward them to investors. Credit checks on lot buyers were made at McDonald's request. Western supplied him with its financial statement and recorded the contracts brokered through MIC with the contract assignee shown as first mortgagees.

In the course of this business, Western's receipts from sales of legitimate contracts proved insufficient to cover operating expenses. Western and its agents then wrote spurious contracts of

sale to persons who never intended to make payments on them. [3/] The "fence-posted" contracts were then sold to investors through Banker's or MIC or pledged as security for loans to Western or Hood. In a few instances the signatures to the contracts were outright forgeries.

At the same time Western continued to contract with legitimate buyers and those contracts were marketed through the same agents. At Western's office Hood kept secret separate files on the fraudulent contracts.

To conceal the fraud Western and Hood supported the forged and fenceposted contracts by making periodic payments on them. These were sent to Banker's, which collected payments on the contracts it had sold, or to Central Service Bureau (CSB), which was employed by Western to collect payments on other assigned contracts.

Banker's and CSB forwaded these receipts to the assignees.

Western's financial success depended on continuing brisk sales of contracts because those receipts were the source of periodic payments on bogus contracts. Whenever Western was making payments either because of default by the orignial obligor or because the contract was a fraudulent one, the assignee was not notified.

CSB kept computer records on all contracts it serviced and indicated in code the contracts on which Western was making payments. The genuineness of contracts was not readily ascertainable by others, however, and because investors generally received regular payments, their suspicions were not aroused until the operation collapsed.

In 1971 the Securities and Exchange Commission investigated Western which agreed to stop interstate sales of un-

registered land sale contracts. Western moved quickly to avoid SEC regulation, however, by selling contracts for sale of lots with cabins and by selling corporate promissory notes secured by first mortgages on lots with cabins. [4/] To further the scheme, Hood falsified appraisals to show the existence of cabins where none were built. In truth, of a total of 800 lots, only 12 had cabins. Many lots were assigned twice and some were never released from trust.

In August 1973, Western defaulted on its obligations. Few note holders were able to obtain their lots and those who could found no cabins on them. Many contract assignees discovered that they were holding worthless paper.

On January 12, 1977, a federal grand jury indicted 16 defendants with 54 violations of federal law. Several pleaded guilty, including Jacob Hood, who became

a prosecution witness. Others proceed to trial in two groups. The appellants here were jointly tried and convicted on several counts. Crowell, a co-defendant, was found not guilty.

Each assignment of error is discussed separately.

II

DISCUSSION

A. Pretrial Publicity.

Appellant Besbris first asserts that the trial court erred in denying his motion for change of venue due to prejudicial pretrial publicity.[5/] He also contends that the limited voir dire by the district judge was inadequate in light of the publicity.

Besbris argues that extensive Arizona press coverage of land fruad schemes at the time of trial created a reasonable likelihood that he could not receive a fair trial in the District of Arizona.[6/] He

claims that the trial judge "perfunctorily" denied his change of venue motion when the circumstances required that it be granted under Fed. R. Crim. P. 21(a).[7/]

The publicity of which Besbris complains, however, consisted primarily of news stories of Arizona's fraud-ridden real estate business. Besbris was mentioned by name but once, several months before trial, when he was indicted. Articles dealt with land frauds generally and did not focus on these defendants. In this respect, Besbris' appeal differs significantly from those in which prejudicial publicity has been found to have impaired a defendant's right to a fair trial. E.g., Sheppard v. Maxwell, 384 U.S. 333 (1966); Silverthorne v. United States, 400 F.2d 627 (9th Cir.1968).

Rule 21(a) requires a change of venue when there is in the district "so great

a prejucie against the defendant that he cannot obtain a fair and impartial trial ...." We do not agree with appellant that general press coverage of Arizona land fraud created such prejudice against him. When a Rule 21(a) motion is made "the ultimate question is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the voir dire examination." 8A Moore's Federal Practice ¶21.10(3), at 21-10 (1977) (quoting Blumenfeld v. United States, 284 F.2d 46, 50(8th Cir. 1960), cert. denied, 365 U.S. 812 (1961)). See Silverthorne v. United States, 400 F.2d at 639-40. See generally ABA Standards Relating to Fair Trial and Free Press § 3.2 119-124 (Approved Draft 1968).

The trial judge has a "large discretion" in gauging the effects of allegedly prejudicial publicity and in taking measures

to insure a fair trial. United States v. Polizzi, 500 F.2d 856, 879 (9th Cir. 1974), cert. denied, 419 U.S. 1120(1975); Silverthorne v. United States, 400 F.2d at 637-38. Besbris has not demonstrated that denial of his motion for change of venue was an abuse of discretion.

He further contends, however, that the trial judge's voir dire was inadequate because jurors were not questioned individually and because the questions proffered by defense counsel were not asked. In analyzing this claim we begin with the proposition that

> (u)nless a trial judge clearly has erred in his estimation of the action needed to uncover and prevent prejudice from pretrial publicity, an appellate court should not intervene and impose its estimate. The court closest to the situation can best evaluate the proper way to walk the difficult line between a vigorous voir dire to determine any possible bias and avoidance of creating bias by specific questions which add "fuel to the flames" in suggesting the presence of controversial issues.

United States v. Polizzi, 500 F.2d at 880 (citations omitted).

Relying on Silverthorne, Besbris asserts that a voir dire examination that calls only for the jurors' subjective assessment of their own impartiality is inadequate and that general questions addressed to the entire panel do not adequately protect a defendant. The assertion is correct as far as it goes. But we recently explained that, although rigorous voir dire of prospective jurors is required when pretrial publicity is great,

> (i)n cases of less publicity,. . . these procedures are not required. Several general questions addressed to the entire panel of jurors, followed by individual questions of jurors who respond affirmatively to the initial inquiries, may be sufficient if it becomes clear that few jurors have any knowledge of the case.

United States v. Giese, No. 74-3407, slip op. p. 518, 532 (9th Cir. Feb. 16, 1978) (emphasis added) (citations omitted).

In this case the court considered the request for individual voir dire but concluded that, although there had been considerable publicity about land fraud, it was clear that few jurors had knowledge of the case before them. In these circumstances there was no abuse of discretion. United States v. Polizzi, 500 F.2d at 880. "only in a case involving extreme pretrial publicity, with demonstrated effects on the prospective jurors, have we held that a trial court's voir dire was inadequate." United States v. Giese, slip op. at 533 (citing Silverthorne, supra). This is not such a case.

B. Severance.

Stewart, Besbris, and Baumann contend it was error to try them jointly. They argue that joinder was improper under Fed. R. Crim. P. 8(b) and, alternatively, that the joint trial was so prejudicial as to

require that their motions for severance under Fed. R. Crim. P. 14 be granted.

It cannot seriously be contended they they were improperly joined for trial under Rule 8(b), for they "participated in the same series of acts or transactions constituting an offense or offenses." United States v. Roselli, 432 F.2d 879, 898 (9th Cir. 1970) cert. denied. 401 U.S. 924 (1971). See also United States v. Barney, 568 F.2d 134, 135-36 (9th Cir. 1978); United States v. Satterfield, 548 F2d. 1341, 1344 (9th Cir. 1977).

The argument that the trial court erroneously denied their motions for severance under Rule 14 also lacks merit. They maintain that during the joint trial the jury heard considerable evidence not properly admissible against them and that they were prejudiced as a result.

Some prejudice necessarily inheres

when defendants are joined for trial. However, "(i)f all that was necessary to avoid a joint trial were a showing of prejudice, there would be few, if any, multiple defendant trials." 8 Moore's Federal Practice ¶ 14.44(1), at 14-14.1 (1977).

Considerations of judicial economy merit serious attention when defendants move for severance. The decision whether the prejudice attending a joint trial outweights the need to conserve judicial resources and to avoid further crowding of federal trial calendars with a succession of factually related actions is, in the first instance, committed to the sound discretion of the district court. United States v. Kennedy, 564 F.2d 1329, 1334 (9th Cir. 1977); United States v. Brashier, 548 F.2d 1315 (9th Cir.1976), cert. denied, 429 U.S. 1111 (1977).

Appellants carry the difficult burden of demonstrating undue prejudice resulting from a joint trial, and we will reverse the trial court only in those rare instances where the refusal to sever amounts to an abuse of discretion. United States v. Campanale, 518 F.2d 352 359 (9th Cir. 1975), cert. denied sub nom. Grancich v. United States, 423 U.S. 1050 (1976).

The appellants here point only to the slight prejudice resulting from any joint trial and the disparity of proof as to each defendant. They have not demonstrated that the jury could not reasonably have been expected to compartmentalize the evidence as it related to each defendant in light of its volume and limited admissibility. United States v. Gaines, 563 F.2d 1352, 1355 (9th Cir. 1977); United States v. Kaplan 554 F.2d 958, 967 (9th Cir. 1977). 8/

Besbris pres nts the related argument

that the evidence at trial demonstrated the existance of at least four distinct fraudulent schemes rather than the one charged in the indictment. We disagree. Although the defendants entered and left the operation at different times, there was no fatal variance rendering the joint trial improper. The evidence was sufficient to present the issue whether there was a single scheme or multiple schemes as a question for the jury. United States v. Porter, 441 F.2d 1204, 1213 (8th Cir.),cert. denied, 404 U.S. 911 (1971).

The circumstances of appellants' joint trial present no reversible error.

C. Admissibility of Evidence.

Besbris charges error in the Court's admission of testimony regarding his actions in another real estate promotion and statements he made to the effect that persons investing in high risk ventures "deserve to be screwed." He argues that the evidence was irrelevant and highly prejudicial.

On direct examination Besbris claimed no knowledge of Western's fraudulent activities. One witness then testified that Besbris subsequently advised a real estate developer about circumvention of subdivision laws and other participated again in deals involving fenceposted contracts. This testimony was relevant to show Besbris' motive, intent, and knowledge as to the fraudulent conduct with which he was charged. So, too, was that as to his contempt for investors.

Fed. R. Evid. 404(b)[9] permits admission of evidence of other acts to prove motive, intent, and knowledge but it must be excluded where it serves only to prove criminal disposition. See 2 Weinstein's Evidence § 404[08] (1977). Whether its probative value sufficiently outweighs its potentially prejudicial impact is a decision committed to the sound discretion of the trial court. United States v. Riggins, 539 F.2d 682, 683 (9th Cir. 1976), cert. denied, 429 U.S. 1045 (1977).

Besbris put his knowledge and intent in issue, and the challenged evidence was relevant on those points. Its introduction may have generated some prejudice but we cannot say that the trial judge failed to strike the proper balance. There was no abuse of discretion and no error.[10]

D. Jury Instructions.

Besbris and Stewart argue that the Court erred in refusing to give an instruction explaining "assignment with recourse" under Arizona law. They say that, because the land contracts were assigned with recourse against Western in the event of default, Western's assumption of payments appeared proper to them. The judge refused to give the instruction because he felt it would oversimplify an important issue in a complex case.

The judge explained that the legal definition of "with recourse" was not disputed. He commented that the application of the doctrine to what the individual defendants did, said, and understood was a matter appropriately left for argument by counsel. The crucial issue was not the term's legal definition.

Instructions are not a substi-

> tute for argument to the jury. If the judge fairly instructs the jury as to the applicable principles of law so as to allow counsel on each side sufficient latitude to argue what he considers to be key points in his case, the trial judge has performed his duty.

United States v. Campanale, 518 F.2d at 362.

There was no need in this case for an instruction on the meaning of the term "with recourse." Defense counsel had abundant opportunity to argue to the jury their clients' knowledge or ignorance of the fraud. There was no error.

E. The Statute of Limitations.

Stewart argues that his participation in the illegal scheme terminated more than five years before the indictment and that his prosecution was untimely.

The mailings upon which the charges were based took place within five years

of the indictment. When he joined the scheme by supplying Western with forged and fenceposted contracts, his coparticipants' use of the mails in its furtherance was reasonably foreseeable. Stewart was therefore properly and timely charged. United States v. Ashdown, 509 F.2d 793, 798 (5th Cir.), cert. denied, 423 U.S. 829 (1975). See also United States v. Outpost Development Co., 552 F.2d 868, 870 (9th Cir. 1977); United States v. Brown, 540 F.2d 364, 376 (8th Cir. 1976) (citing Pereira v. United States, 347 U.S. 1, 8-9 (1954).

He contends, however, that the mailings with which he was charged were payments intended to "lull" investors into inaction by concealing the fraud. Citing Gruenwald v. United States, 353 U.S. 391 (1957), he analogizes this to a subsidiary "concealment" conspiracy which does not lengthen the conspiracy's duration for

purposes of the statute of limitations.

We disagree. The fraudulent scheme depended heavily on the continued sales of real estate investment paper and it was essential that holders of real estate contracts or secured notes not suspect that fraud was involved. The "lulling" payments concealed the fraud, caused some investors to invest more money, and maintained Western's reputation as a reliable source of investment.

Mailings to victime after they have parted with their money can be "for the purpose of executing" a fraudulent scheme. United States v. Sampson, 371 U.S. 75, 80 (1962). As in Sampson, in this case the scheme was not fully executed at the time the mailings were made.[11/]

F. Judicial Misconduct.

Baumann asserts that the trial judge

improperly interjected himself into the trial and prejudiced the defense.

We have said repeatedly that trial judges are more than moderators or umpires. The judicial role extends to examining witnesses to clarify the evidence and to controlling the trial and its participants so as to minimize confusion and delay while maximizing orderly, clear, and efficient presentation of evidence. But a judge must be aware of his sensitive judicial position and be on guard to avoid even the appearance of advocacy or partiality. See United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975); Unites States v. Pena-Garcia, 505 F.2d 964, 967 (9th Cir. 1974); Unites States v. Harris, 501 F.2d 1, 9-11 (9th Cir. 1974); United States v. Malcolm, 475 F.2d 420, 427 (9th Cir. 1973); Smith v. United States, 305 F.2d 197, 205 (9th Cir.), cert. denied, 371 U.S. 890 (1962).

Charges of judicial misconduct are

not dismissed lightly. But we are aware of the enormity of a judge's task and the physical and mental effort required to conduct a long, complex trial.[12/] We have reviewed the record with care and have found that, although a few of the judge's remarks were sharp, even sarcastic, they do not represent an abuse of discretion that warrants a new trial. Cf. United States v. Harris, 501 F.2d at 9-11 (judge's conduct required reversal).

G. Sufficiency of the Evidence.

1. McDonald. McDonald was convicted on seven counts of mail fraud and transporting fraudulently obtained property. The government contends that he participated actively in Western's land fraud scheme. McDonald urges that the evidence was unsufficient to sustain his convictions because it did not show participation

with intent to defraud. He maintains that he marketed Western's contracts without knowledge of the fraud which he discovered long after he ceased selling the contracts, and that he was in fact a victim of the scheme.

On appeal we view the evidence and the reasonable inferences therefrom in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Valentin, No. 77-2748, slip op. p. 553, 554 (9th Cir. Feb. 17, 1978). In reviewing denial of the motion for acquittal we ask: Could the jurors reasonable decide that they would not hesitate to act in their own serious affairs upon factual assumptions as probable as the conclusion that the defendant is guilty? United States v. Oropeza, 564 F.2d 316, 321 (9th Cir. 1977); United States v. Kaplan, 554 F.2d at 963.

The government contends that McDonald displayed a willful disregard of the truth in his business activities and that such disregard was tantamount to actual knowledge of the fraud. The prosecution theorized that McDonald was aware of a "high probability" that some or all of the contracts he sold were fraudulent, but that he deliberately shut his eyes to avoid learning the truth. Such conduct will support a criminal conviction. See Leary v. United States, 395 U.S. 6, 46 n.93 (1969); United v. Jewell. 532 F.2d 697, 701-02 (9th Cir. 1976) (en banc). See also United States v. Murrieta-Bejarno, 552 F.2d 1323, 1325 (9th Cir. 1977); United States v. Esquer-Gamez, 550 F.2d 1231, 1235 (9th Cir. 1977).

In mail fraud cases, "[o]ne who acts with reckless indifference as to whether a representation is true or false is is chargeable as if he had knowledge of its falsity." United States v. Love,

535 F.2d 1152, 1158 (9th Cir.), cert. denied, 429 U.S. 847 (1976) (quoting Irwin v. United States, 338 F.2d 770, 774 (9th Cir. 1964), cert. denied, 381 U.S. 911 (1965).

The government maintains that McDonald's general knowledge of the Arizona real estate business, his knowledge that in 1972 one of his salesmen who had purchased a Western contract had not received regular payments, and his actions in covering his own losses when the fraud was exposed add up to criminally reckless conduct.

The record, however, is entirely devoid of proof that McDonald had the intent necessary to sustain a conviction. It shows that he merely mentioned that fraud was a possible cause of his salesman's problems and that the delays in payment were satisfactorily explained later.[13] Although McDonald's actions

in covering his own investments and loans to Western by demanding bona fide contracts to replace fenceposted agreements sold and pledged to him may have been unfair to his former customers, those acts came long after he ceased selling contracts and could not alone establish fraudulent intent at the time he sold them. Finally, the safeguards he demanded and the precautions he took demonstrate that McDonald dealt cautiously with Western and Hood.[14/]

While he was selling the contracts, he had no complaints from investors and invested heavily in the contracts himself. He made several trips to Arizona to meet with Hood and to observe the property offered for sale. When the scheme fell apart, McDonald was one of the big losers.

McDonald's "mere 'involvement in an unsavory, fly-by-night scheme' is not sufficient to establish 'knowing partici-

pation in a scheme to defraud.'" United States v. Piepgrass, 425 F.2d 194, 199 (9th Cir. 1970) (quoting Windsor v. United States, 384 F.2d 535 (9th Cir. 1967). We cannot infer from the facts in the record that McDonald had, beyond doubt, the specific intent to defraud "because the logical relationship between what he could have known and a specific intent has no rational basis." United States v. Piepgrass, 425 F.2d at 199-200 (emphasis in original). See also United States v. Klein, 515 F.2d 751 (3d Cir. 1975).

2. Stewart. The government's proof showed that Stewart was deeply involved in Western's fraudulent operations. He and those under his direction supplied Western with forged and fence-posted contracts as later as 1972.

The mailings that formed the basis of the counts in the indictments were

were reasonably foreseeable results of his affiliation with the scheme.

His conviction on each of five counts related to payments mailed to investors intending to lull them into inaction by concealing the fraud.[15] It was not necessary for the government to show that Stewart himself deposited the payments in the mail. His participation in a scheme entailing reasonably foreseeable use of the mail was sufficient to sustain his conviction. United States v. Outpost Development Co., 552 F.2d at 870; United States v. Brown, 540 F.2d at 376.[16]

3. Baumann. Baumann, who owned Banker's, brokered contracts and mortgages for Western. He was convicted on four counts of mail fraud.

Three of the counts concerned his mailing of monthly payments to investors holding contracts for which Western supplied funds. The fourth count concerned a letter

to Hood, billing him for payments due to an investor holding a contract on which the named obligor had never made a payment.

There was sufficient circumstantial evidence from which the jury could infer Baumann's intent to defraud, including testimony that he had been involved in other fenceposting schemes.[17/] The mailings were part of the mechanism employed to insure continuing generation of fraudulently procured revenues. United States v. Sampson, 371 U.S. at 80.[18/]

III. CONCLUSION

McDonald's convictions are reversed. The convictions of the other appellants are affirmed on all counts.

Bail is revoked now as to the defendants-appellants Baumann, Besbris and Stewart. The mandate will issue at once.

FOOTNOTES

1/ Typically, Western would obtain an interest in a tract of land with title held in trust by the owner. The trust agreement gave Western the right to subdivide into lots. As lots were sold, a "release price" was paid into the trust and the trustee issued a deed for those lots in the name of Western.

Lot purchasers contracted for a down payment and subsequent monthly installments of the purchase price Western held the deeds as security until final payment.

2/ Contracts were assigned with "full recourse" against Western in the event of default by the contract lot purchaser.

3/ Sham buyers signed contracts with the assurance that they were not expected to make payments. Some of them were paid $50. for their signatures.

4/ The changes in practice reflected an attempt to avoid the registration requirements of the Securities and Exchange Act of 1933 by marketing instruments within the execption of Rule 234, 17 C.F.R. Section 230.234 (1977). The fraudulent character of the scheme, however, remained unchanged.

5/ Besbris, an attorney admitted to practice in California and Arizona, worked for Western for five months late in 1971 and early in 1972. He was convicted of seventeen counts of mail fraud, aiding and abetting and interstate transportation of fraudulently obtained property. While

at Western he served as corporate secretary and house counsel.

6/ Appellant supplemented the record with the transcript of a hearing on a motion for change of venue in an unrelated land fraud prosecution originally scheduled for trial in Phoenix, later moved to Prescott, Arizona, and then to San Diego, California. In that case one reason for the venue change from Prescott to San Diego was extensive pretrial publicity. Appellant considers the transcript germane to the change of venue he sought and was denied.

The United States Attorney supplemented the record with the affidavit of the government's trial attorney in that case. It reveals that the motion there was unopposed. Furthermore, that trial involved a second group of defendants linked to an illegal scheme for which many of their associates had already been convicted. The defendants had been named repeatedly in the press. Moreover, limited courtroom facilities in Prescott made it undesirable for the lengthy trial contemplated there.

Even were we to consider the publicity in this case comparable to the publicity in that one, it would be far simpler to find impartial veniremen in a city the size of Phoenix than in Prescott.

7/ Rule 21. Transfer From the District for Trial.

> (a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to him to another district whether

> or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

* * * *

8/ The trial judge was aware that some evidence related to less than all defendants. In those instances he carefully instructed the jury on the limited consideration such evidence should receive. The admonitions adequately safeguarded the defendants' rights.

The sum of appellants' argument is that they stood a better chance of acquittal had they been separately tried. That is too insubstantial a basis to establish an abuse of discretion. United States v. Cella, 568 F.2d 1266 (9th Cir. 1978).

9/ Rule 404--Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

10/ Fed. R. Evid. 401 recites an expansive definition of relevance and Fed. R. Evid. 402 provides that all relevant evidence is admissible as a general rule. Under Fed. R. Evid. 403, " a lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

Appellant asserts that the evidence in question should have been excluded. Among other things, he argues that the fact that the testimony described conduct and statements subsequent to the criminal acts with which he was charged renders it irrelevant. We are convinced, however, that the evidence was relevant to the issues raised. The timing of the statements and conduct attributed to appellant was a factor to be considered by the court in weighing probative value against the danger of unfair prejudice. Cf. United States v. Hearst, 563 F.2d 1331, 1336 (9th Cir. 1977) (evidence of subsequent crimes relevant to intent and defense of duress).

Decisions regarding admissibility require application of the balancing formula in the rules, an undertaking unmistakably committed to the discretion of the trial judge. See United States v. Curtis, 568 F.2d 643, 645-46 (9th Cir. 1978); United States v. Butcher, 557 I.2s 666, 670 (9th Cir. 1977).

11/ As to whether the mailings in question were for the purpose of executing the scheme, see note 16 infra.

12/ The trial lasted five weeks. The reporter's transcript exceeds 3,300 pages.

13/ The salesman's investigation revealed that the original contract obligor had, indeed, intended to purchase the lot in question but had defaulted on his obligation. Western offered to substitute another contract for the one in default but the salesman asked to receive instead, and was given, a refund of his investment.

14/ There was evidence that McDonald sold several contracts with his personal assurance that the investment was "good as gold." When he made those remarks, he had no reason to believe otherwise.

McDonald may have in some respects violated a fiduciary duty to his investment clients, but that in itself would not demonstrate the specific intent necessary to sustain a conviction. Post v. United States, 407 F.2d 319, 329 (D.C. Cir. 1968), cert. denied, 393 U. S. 1092 (1969).

15/ It has been recognized that each mailing in execution of a fraudulent scheme constitutes a separate offense of mail fraud. See, e.g., Atkinson v. United States, 344 F.2d 97, 98 (8th Cir. 1965); Hanrahan v. United States, 348 F.2d 363, 366 (D.C. Cir. 1965).

Stewart argues that his convictions on counts 8 and 9 cannot stand because, although they are based on mailings of separate checks, each representing a monthly payment on a separate fraudulent contract, the checks were sent to one investor in a single envelope. Thus, he contends, there was but one "mailing."

The argument cannot stand. The

essence of the offense is use of the mails to defraud. Each check was mailed pursuant to the scheme to lull investors into a sense of security as to their investments, enabling Western to continue to operate unimpeded. That the two checks, each of which independently helped to execute the plan, were sent in one envelope is of no consequence.

16/ Stewart contends that to find that the mailings were part of the fraud's execution would be to broaden unduly the construction previously given that element of the crime. We agree that to sustain a conviction there must be more than a showing of a scheme to defraud, defendant's involvement, and the fact that a mailing occurred. See United States v. Maze, 414 U.S. 395, 399-402 (1974); Parr v. United States, 363 U.S. 370 (1960); Kann v. United States, 323 U.S. 88 (1944); United States v. Kaplan, 554 F.2d 958, 965 (9th Cir. 1977). There must be proof that the mailing "was in furtherance of the scheme to defraud." United States v. Kaplan, 554 F.2d at 965.

Unlike Maze, Parr, and Kann, however, where mailings took place after the defendants had accomplished their criminal objective, this case resembles more closely United States v. Sampson, 375 U.S. at 80, in which the "mailings. . .were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." United States v. Maze, 414 U.S. at 403.

17/ Unlike appellant McDonald, Baumann was closely tied to Western's operations almost from their inception. His

relationship with Hood and the manner in which he managed Banker's supplied ample evidence from which the jury could conclude beyond doubt that he participated knowingly in the fraud or, being aware of its "high probability," intentionally shut his eyes to it.

18/ See note 16, supra.

No. 78-158

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 576 F.2d 1350.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1978. A petition for rehearing was denied on June 7, 1978. The petition for a writ of certiorari was filed on July 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge conducted an adequate *voir dire* examination of prospective jurors to ascertain whether they had been influenced by pre-trial publicity concerning land fraud in general.

2. Whether there was a variance between the fraudulent scheme charged in the indictment and that proved at trial.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of fifteen counts of mail fraud, in violation of 18 U.S.C. 1341, and of two counts of interstate transportation of fraudulently obtained property, in violation of 18 U.S.C. 2314.[1] He was sentenced to concurrent five year terms of imprisonment and was fined $300 on each count. The court of appeals affirmed (Pet. App.).

The facts are summarized in the opinion of the court of appeals (Pet. App. 2-7). The evidence showed that in 1966 co-defendant Jacob Hood[2] founded Western Land Sales (WLS), which sold real

[1] Petitioner was tried together with co-defendants Henry McDonald, Marcus Baumann, Hayes Stewart, and Robert Crowell on a 54-count indictment (Pet. 16). McDonald, Baumann, and Stewart were each convicted on numerous counts, and their convictions were affirmed by the court of appeals. Co-defendant Stewart's petiiton for a writ of certiorari is pending in this Court (No. 77-1720).

[2] Hood pleaded guilty to four counts of the indictment and testified as a government witness at trial.

estate on a commission basis for various Arizona landowners. WLS entered into installment sales contracts with purchasers, and retained title to the land sold with the purchase money was paid in full (Pet. App. 32).

In 1969 and 1970, WLS entered into agreements with Bankers Finance and Holding Company (Banker's) and McDonald Investment Company (MIC) by which Bankers and MIC sold WLS's land sale contracts to investors. In the Winter of 1970-1971, WLS, finding itself in financial difficulty, began to sell, through Bankers and MIC, fraudulent land sale contracts in the names of buyers who never intended to make payments on the purchase price.[3] To conceal the fraud, WLS periodically sent to investors payments on the fraudulent contracts purportedly made by the purchasers (Pet. App. 4).

Late in 1971, the Securities and Exchange Commission (SEC) began to investigate the WLS sale of these contracts, and thereafter WLS agreed to cease the interstate sale of the contracts. In mid-1972, WLS sought to avoid SEC registration by selling corporate promissory notes secured by mortgages on lots with cabins. Few of the lots had cabins, however, and Hood falsified appraisals of the lots to reflect the existence of cabins. Moreover, many lots were assigned more than once. In 1973, WLS defaulted on its obligation. Few of the note holders

[3] These sham buyers, some of whom were paid $50 for their signatures, were assured that they were not expected to make payments (Pet. App. 32).

were able to obtain their lots and those who could found no cabins on them (Pet. App. 5-6).

Petitioner served as corporate secretary and counsel for WLS between November 1971, and June 1972 (Pet. App. 32-33). As part of his duties, he researched WLS lot purchases records to determine the number of lots which were to be released for sale (Tr. 1852). He thus became aware that many of WLS's land sale contracts were not made with bona fide purchasers. Using this knowledge, petitioner was instrumental in arranging for several investors to make large purchases of fraudulent contracts (Tr. 1861-1863).[4]

ARGUMENT

1. Petitioner contends (Pet. 10-14) that the trial judge failed to conduct an adequate *voir dire* examination of prospective jurors to ascertain whether they had been influenced by press coverage of Arizona land fraud schemes in general. The court of appeals properly found this contention to be without merit

[4] At trial, petitioner admitted to having known that WLS was financially supporting contracts and that he transmitted letters and checks amounting to a thousand dollars each to Central Service Bureau, although he claimed that he thought this money came from the sale of land and felt he owed no obligation to notify investors that WLS was making the payments rather than the lot purchasers (Tr. 1907-1908). Petitioner further admitted that he caused to be prepared in final form an agreement for sale of a particular lot (Gov't. Exhs. 55 and 56) and an investment letter reflecting the terms of this contract for the sale of the lot (Tr. 1912-1914). He also admitted that he knew that land sales contracts were being used as collateral for loans to WLS (Tr. 1924).

and we invoke its careful opinion on this point (Pet. App. 7-12).

As petitioner concedes (Pet. 10) he was mentioned in but one article, which "certainly does not, by itself, constitute massive pre-trial publicity." At *voir dire*, the trial judge read the indictment to the veniremen who were instructed to indicate any acquaintance with the facts of the case or the names mentioned (X Tr. 126). Those who so indicated were examined individually by the court (see X Tr. 146, 159-161).[5] The court then inquired as follows (X Tr. 161-163):

> THE COURT: What I am going to ask you next is this. We do know—most of us—that the media—newspapers, TV and television—have carried stories about alleged fraudulent activities by persons associated with land development companies. Of course the charges are read to you, which of course are no evidence whatsoever of the guilt of anybody, as I told you earlier, allegations of that kind. Now by reason of the stories and so forth that have appeared previously, is there any reason that any of you know of why you couldn't fairly and impartially sit in this case and find the facts according to the evidence presented to you and the instructions on the law given to you by the Court?
>
> (No response).
>
> THE COURT: Are there any of you so prejudiced one way or the other that you could not

[5] Significantly, none of the jurors who were examined individually indicated any bias arising from exposure to the publicity of which petitioner complains.

be fair and impartial in this case? The reason I particularly ask you that is that in every trial everybody in a civil or criminal case is entitled to be tried solely and wholly on the basis of evidence presented to them here in Court, and the facts are not to come from any other place or any other source, and any opinion you form should be based upon the facts presented to you here in Court and should not be derived from anywhere else. That is one of the big problems we have nowadays with the press. The press seems to believe sometimes that there is only one Constitutional Amendment involved and that is free press, which is a sacred and honorable one, but there is also another called a fair trial which is equally sacred and honorable and they forget there are two of them, it seems. For that reason it is important that you are in such a frame of mind that you fairly and impartially try this case based on the evidence you hear here and not on opinions derived from somewhere else. So I reemphasize that. If any of you have any problems with that, let us know. Otherwise we will go ahead. Does anybody have any problems with that, what I have just stated?

(No response).

The trial judge is vested with broad discretion in determining the proper scope and extent of *voir dire* examination. *Ristaino* v. *Ross*, 424 U.S. 589, 594 (1976). In light of the general nature of the publicity involved in this case, the examination conducted by the court was adequate to ensure that petitioner would receive a fair trial, and the court's determination that a more extensive examination of individual jurors was

not necessary was certainly not an abuse of discretion.[6] See *United States* v. *Polizzi*, 500 F.2d 856, 879 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975).

2. The indictment in this case charged as the basis for each count that petitioner and his co-defendants engaged in a single scheme, set forth in full in Count 1, to defraud and to obtain money by false representations. Petitioner contends (Pet. 15-23) that the proof at trial showed the existence of four separate schemes to defraud and therefore varied from the charges against him.

The evidence established a single scheme to obtain money through the fraudulent operation of WLS's land sales business. Petitioner argues, however, that his conduct should be separated from the land sale contract transactions involving Bankers and MIC occurring before petitioner was employed by WLS, as well as from the promissory note sales which occurred after he had left WLS. The flaw in this contention is that all of these fraudulent activities were but steps in an ongoing effort to keep WLS out of financial difficulty. The cessation of the sale of land sale contracts and the initiation of the sale of secured promissory notes in 1972 did not mark the end of one scheme and the beginning of another; they were

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[6] Petitioner's reliance on *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), is misplaced. In *Sheppard*, *supra*, 384 U.S. at 345, it was clear that the jurors had been constantly exposed to extensive news media coverage of the very crime for which the defendant was to be tried. In the instant case, the *voir dire* determined that the jurors did not know the particulars of the case, nor did they know of petitioner's involvement in land sale fraud.

no more than a change in tactics made necessary to avoid difficulties with the SEC.

As the court of appeals observed (Pet. App. 16), "the defendants entered and left the operation at different times," and petitioner became involved in the scheme after it began and left WLS before the scheme ended. It was not necessary to show that each defendant was involved in all aspects of the scheme. Cf. *Blumenthal* v. *United States*, 332 U.S. 539, 556-558 (1947). By virtue of his position as a corporate officer, petitioner was well aware of the general scope of WLS's continuing efforts to defraud, and he knowingly participated in those efforts by arranging for the sale of fraudulent land sale contracts. He was therefore a participant in the overall scheme charged in the indictment.[7] Moreover, since the evidence supported the existence of a single fraudulent scheme, of which petitioner was a part, the

[7] Even if the evidence had showed more than one scheme to defraud, the variance would not entitle petitioner to relief unless it was prejudicial. *Berger* v. *United States*, 295 U.S. 78 (1935). There was clearly no prejudice here. Assuming that there were multiple schemes, they were nonetheless parts of "the same series of acts or transactions" (Fed. R. Crim. P. 8(b)) and as such could have been joined for trial. A severance would not have been required since the joinder would not have been prejudicial. See Fed. R. Crim. P. 14. The case, involving five defendants, was not so complex as to render it difficult for the jurors to compartmentalize the evidence against each defendant. Thus *Kotteakos* v. *United States*, 328 U.S. 350 (1946), upon which petitioner relies, is clearly distinguishable. In *Kotteakos*, evidence showed eight separate conspiracies involving thirty-two conspirators, thirteen of whom remained in the case when it was submitted to the jury.

district court did not err in refusing to charge the jury that it could find that there were multiple schemes to defraud. Cf. *United States* v. *Braverman*, 522 F.2d 218, 223 (7th Cir. 1975); *United States* v. *Barrera*, 486 F.2d 333, 339 (2d Cir. 1973).[8]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[8] At the close of petitioner's case, counsel informed the court that he was unable to formulate a proposed jury instruction regarding whether the evidence proved one or multiple schemes, notwithstanding the court's receptiveness to such an instruction (XII Tr. 2712-2713). Thereafter, petitioner neither submitted such an instruction nor objected to the charge on the ground that it did not include such an instruction. In these circumstances petitioner should not now be heard to complain of the failure of the trial judge to give such an instruction.

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ATTORNEY FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-158

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ALLAN J. BESBRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner's Reply Brief

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Introduction

Petitioner files this Reply Brief to correct certain errors made by the government in its Brief in Opposition. Rule 24(4), Rules of the Supreme Court.

Argument

Statement of Government: The government states that "In 1969 and 1970, WLS entered into argeements with Bankers Finance and Holding Company (Banker's) and McDonald Investment Company (MIC) by which Banker's and MIC sold WLS's land sales contracts to investors." (Op. Br. 3)

Although an accurate statement of fact, the inference that these agreements were somehow connected or interrelated, and thereby part of an overall scheme to defraud, is improper. As was stated in Petitioner's Brief, Banker's and MIC were business competitiors that had no interrelated business at all. (Pt. Br.18)

The government further states that "As part of his duties, he [Petitioner] researched WLS lot purchases records to determine the number of

lots which were released for sale (Tr. 1852). *He thus became aware that many of WLS's contracts were not made with Bona Fide purchasers.*" (emphasis added) (Op. Br. 4)

Such argument is patently non-sequitur. Researching the lot inventory of WLS amounted to nothing more than a physical inventory of the lots which were sold (without regard to the underlying facts of any sale) versus the number of lots available for sale. From this information petitioner had no warning which alterted him to any of the fraudulent activity at WLS.

Furthermore, the government argues that

"By virtue of his position as corporate officer, petitioner was well aware of the general

scope of WLS's continuing efforts to defraud...". (Op. Br. 8)

Such argument is without foundation in the record, and in fact is contrary to the testimony of the government's chief witness, Mr. Hood, the president of WLS.

Mr. Hood testified that in the government's case in chief that he never told petitioner of the fraudulent activities of WLS. (Tr. 1531). Of all the victims of WLS, Petitioner spoke to only one, a Mr. McCollum. Mr. Hood testified that Petitioner made no representations as to the authenticity of the contracts sold to Mr. McCollum. (Tr. 1447)

Mr. Hood unrefutedly testified that over the seven year period WLS operated he sold approximately 800 lots. It was not uncommon for approximately five to

ten percent of those on-site sales to become delinquent or go into default. These were legitimate contracts which because of that attrition became the obligation of WLS to support because of its indorsement with recourse of the contracts. Mr. Hood lastly testified that there were only fifty to sixty fraudulent contracts involved at WLS. (Tr. 1511-1522)

Petitioner admitted that he knew WLS was supporting contracts, but also knowing that fifty or sixty contracts would not be an unusual number to support because of the volume of WLS's sales, petitioner was not alerted, by the fact of support, to draw the inference that the supported contracts were fraudulent. To assume otherwise is nonsense.

To make its argument as it does, the government must show where petitioner obtained the knowledge that there were fraudulent activities going on at WLS. The contrary knowledge of petitioner is clearly established in the record:

1. There is nothing evident from inventorying the lots available for sale other than a mechanical counting of the sold versus the unsold lots;

2. The number of contracts being supported (which well could have been delinquent or defaulted legitimate contracts) was within the acceptable range of contracts in default in the industry. This was no "red flag" to petitioner.

3. Petitioner made no representations as to authenticity of the contracts.

4. Mr. Hood never discussed the fraudulent activities of WLS with petitioner;

5. There was no distinctive marks made on the contracts or in the company records, available to petitioner, which separated delinquent and defaulted contracts from fraudulent ones. Both were marked with an "X"; (Tr. 1522)

6. Petitioner advised Mr. Hood not to sell any contracts, for economic reasons. (Tr. 1534).

Lastly, footnote 4 of the Opposition Brief suggests that petitioner was involved in selling land or in selling contracts from land sales. That is clearly erroneous. What petitioner did do, as a lawyer, was prepare an agreement which evidenced a loan between Mr. McCollum and WLS, with certain land sales contracts as collateral for that loan. The loan agreement called for WLS to pay "pre-paid" interest on the loan. With that money, Mr. McCollum purchased a land sales contract, sold to

him by WLS, not by petitioner.

1. *Voir Dire* Argument.

The government argues that the *voir dire* in this case was adequate because the massive publicity which existed did not mention Petitioner by name and that those who individually responded to the reading of the indictment by saying that they were acquainted with some of the individuals mentioned therein, did not indicate any bias from exposure to the publicity of which petitioner complains. The reason none of them indicated any bias is that no one asked them. They simply indicated that they were acquainted with some of the victims or parties and were excused.

The government suggests that our reliance upon *Shepard v. Maxwell*, 384 U.S. 333 (1966) is misplaced because the

voir dire was adequate to determine that none of the jurors knew the particulars of this case, nor did they know of petitioner's involvement in land sales fraud.

The issue before this Court is much broader: What did the jurors objectively know of fraudulent land sales activities in general?

The obvious source of their knowledge would have been the almost daily media and press saturation of the subject for almost two years before petitioner's trial. Arizona was rotten with land fraud, according to the media and press, and not one opportunity was ever missed to bring that fact to the public's mind. The press was very successful in that regard.

The Court's *voir dire*, such as it was, merely asked the jurors to subjectively assess their own attitudes about their prejudices and biases (ostensibly created by press coverage of land fraud in general) and speak out if they were "...so prejudiced one way or the other that [they] could not be fair and impartial in this case". (X Tr. 161-163)

No inquiry was made or allowed into what objective information these persons had in their minds, which well could have been the basis for their subjective determination of non-bias, despite petitioner's request for such inquiry.

The repetitious allegations, charges and revelations concerning fraudulent land development companies in the Arizona news media so subconsciously conditioned virtually every literate juror in the District that people who participated

in land sales activities were unsavory and born swindlers was such that admonitory instructions could not eradicate such beliefs.

In *Delaney v. United States*, 199 F.2d 107 (1st Cir.1952) the Court was led to observe:

> "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may competently exclude even the unconscious influence of his preconceptions as to probable guilt, engineered by a pervasive pre-trial publicity."

By asking the jury panel, en masse, about any possible bias and prejudice they had, without asking them objectively

the source of that information is useless. As was noted in *Irvin v. Dodd*, 366 U.S. 717 at 728,

> "No doubt each juror was sincere when he said that he would be fair and impartial * * * but the pyschological impact requiring such a declaration before one's fellows is often its father."

In summary on this point, massive pre-trial publicity does not always have to attach to the particular defendant in order for it to be the kind of bias and prejudice that the law wishes to expose and eliminate from a jury. If the trial judge does nothing more than ask if any of the prospective jurors are biased and prejudiced against a defendant because they know him, or know of

the crime which he is accused of commiting as that crime relates to him (i.e. that Sam Shepard was accused of murder),without also asking what attitudes they may have formed about a crime which is constantly brought to their attention by the media and is particular to the community in which they live, then justice is not done if that defendant is convicted by a jury with an unprobed state of mind.

The law and the American system of criminal justice does not allow such a travistv of justice to remain uncorrected.

2. *Kotteakos* Argument.

The government views petitioner's argument as a request for him to have been separated from his co-defendants because the activities of which he was accused took place over a long period of time and he was present only a short part of that time.

That is only part of petitioner's argument.

In *Blumenthal v. United States*, 332 U.S. 539 (1947), this Court contrasted those defendants situations with that of Mr. Brown in the *Kotteakos* case. The Court said:

> "The case therefore is very different from the facts admitted to exist in the Kotteakos case. Apart from the much larger number of agreements there involved, no two of those agreements were tied together as stages in the formation of a larger, all-inclusive combination, all directed to achieving a single unlawful end or result."

The court then went on to demonstrate the differences. These may well be viewed as the criteria for determining

when a series of separate conspiracies exist as opposed to a single conspiracy with multiple parties.

The criteria are:

1. Were the separate agreements all tied to a single, all incompasing conspiracy or were they each separate agreements with its own distinct, illegal end?

2. Were all of the parties mutually interested in the outcome of the conspiracy, or was each conspirator only interested in whether his agreement was effective?

3. Did each conspirator aid the others to achieve the unlawful end, or rather did none aid in any way, by agreement or otherwise, the others in achieving the unlawful end?

The *Blumenthal* court then said

> " The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan." 332 U.S. at 558.

As was set forth in Petitioner's Brief, pages 16-19, four separate schemes were proved by the evidence. The central or hub figure in each was Jacob Hood and his company, Western Land Sales. Separate spokes or agreements were made with Baumann, Banker's, and MIC, and with Petitioner in respect to loans

made by sophisticated investors to WLS.

Applying the criteria set forth in *Kotteakos* and amplified in *Blumenthal*, the following analysis emerges clearly:

1. According to the evidence, each agreement was distinct. Banker's bought and sold contracts from WLS. Baumann, the president of Banker's not only could care less what other involvement WLS had with MIC or Petitioner, but would have preferred, if given the choice, not to have WLS deal with them, so as to allow Banker's to have access to all of WLS's contracts, rather than only a small part of them. Likewise with MIC. MIC was a business competitior of Banker's and was totally unaware of the activities or even of the existence of Banker's. Clearly, each agreement was separate and unrelated. Furthermore, Petitioner was unrelated to either Banker's or MIC. Petitioner

was the attorney for WLS and its secretary. He aided WLS by introducing Hood to certain sophisticated investors whom he had formerly known with the end of those persons making loans to WLS, not purchasing contracts for resale to the public.

The only commonality was WLS. At an irrationally high level of abstraction, it could be argued that from WLS's viewpoint all of the agreements were part of an over-all scheme to raise money by the disposition of fraudulent contracts, but that was certainly no part of the agreement between any one of the co-conspirators with the others, inter se. Only Hood knew of the overall plan. That existed only in his mind. Never having been communicated in any way with the co-defendants, it hardly could have been part of their over-all scheme. There simply was no overal-all scheme.

2. No individual was at all interested in the acts of the other co-defendants and therefore could not have been interested or concerned with their activities as part of the outcome of the conspiracy. The evidence clearly showed, however, that each conspirator was vitally interested in the outcome of the agreement he had with WLS.

3. From the evidence, it was clear that none of the conspirators aided the other, expressly or otherwise, in the other's achieving the end of the agreement he had with WLS. Only Hood was interested in the over-all plan. He was very concerned that MIC continued to sell contracts. MIC was not at all concerned whether Banker's sold any contracts at all. Likewise, Banker's was very concerned that their contracts were sold, but did not care whether MIC sold any at all.

Furthermore, Petitioner advised Hood not to sell contracts at all, but to use them as a source of cash flow for his company. If it became necessary to raise money for operations, then Petitioner advised Hood to hypothecate the contracts for a short term, using them as collateral. Obviously, this in no way aided Banker's or MIC.

In summary, at a high level of abstraction, such as the level of abstraction wherein all men are brothers, or all nations are one people, certainly there was an overall scheme. But the law does not, and properly should not, attach criminal liability by trying all co-defendants together when they did not act at such a high level of abstractive conduct.

Each individual defendant participated with WLS totally independently of the other, and as such, should not have been tried together.

3. Unrefuted Arguments:

In its Brief in Opposition, the government has failed entirely to deal with the important issues raised in Petitioner's Brief concerning the issue of whether the question of single or multiple conspiracies in a trial of this sort and complexity is a matter of fact or of law. (Pt. Br. 20-22)

Furthermore, the government has not dealt with the issue of whether the judge has a duty to instruct the jury, sua sponte, in a case of this complexity, concerning the existance of multiple or single conspiracies.

CONCLUSION

Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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Dated: Scottsdale, Arizona
October 21, 1978

CERTIFICATE OF SERVICE

I, the undersigned, being a member of the Supreme Court Bar, certify that I have deposited in the United States Mail, airmail postage prepaid, the original and forty copies of this PETITIONER'S REPLY BRIEF, addressed as follows:

Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C.

and that I deposited in the United States Mail, airmail postage prepaid, three copies of this PETITIONER'S REPLY BRIEF, addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

I further certify that this Certificate is made in compliance with Rule 33(3)(b), Rules of the Supreme Court.

This Cerfificate is filed on October 24, 1978 and that the mailings certified above took place on this date.

Harry M Weiss

Harry M. Weiss
Attorney for Petitioner